Lim Tee Hin v Ledchumanan a/l Nagappan

HIGH COURT (SEREMBAN) — ORIGINATING MOTION NO 25-27 OF 1999
LOW HOP BING J
21 JUNE 2004

Land Law — Restraint on dealings — Caveats — Wrongful entry of private caveat — Assessment of damages

Moneylenders — Contract for advance of money — Whether a moneylending transaction — Whether presumption of moneylending can be invoked by person on whom interest was imposed — Moneylenders Act 1951 s 3

The plaintiff had purchased a piece of property in a public auction. The defendant lodged private caveats on the property soon thereafter. Consequently, the sale of the property could not be completed by the stipulated completion date. The plaintiff obtained an extension of time from the court to avoid the forfeiture of the deposit paid by the plaintiff.

The private caveats lodged by the defendant were finally set aside by the learned judge who also ordered that damages be assessed and paid by the defendant to the plaintiff. The learned registrar awarded the following damages in favour of the plaintiff: (a) bank interest amounting to RM20,358.52, which was paid by the plaintiff to his bank; (b) company interest amounting to RM47,101.37, which was paid by the plaintiff to Pembinaan Purcon Sdn Bhd ('Purcon'); and (c) legal fees amounting to RM27,042.90, which was paid by the plaintiff to his solicitors.

The defendant appealed against the decision of the registrar. One of the issues raised by the defendant was that the loan by Purcon to the plaintiff to enable the latter to complete the purchase was a moneylending transaction under s 3 of the Moneylenders Act 1951 ('the Act') and hence unenforceable under s 15 thereof.

Held, dismissing the defendant's appeal:

(1) Under s 329(1) of the National Land Code, the burden of proof was cast on the person claiming compensation to establish that: (a) a private caveat had been entered ; (b) the private caveat was entered wrongfully or without reasonable cause; and (c) damage or loss had been suffered thereby. Items (a) and (b) had already been established when the caveats in question were ordered to be removed by the learned judge. (see paras 17 and 18).

(2) The bank interest was payable due to the extension of time granted by the court. There was evidence that the bank interest had been reduced after taking into account a refund of a sum of money as the plaintiff was able to settle the balance purchase price earlier. This obviously constituted a mitigation of loss by the plaintiff. While it was true that the bank interest had been paid by Purcon on behalf of the plaintiff, this did not alter the fact that the plaintiff eventually had to repay the bank interest to Purcon (see paras 27 and 28).

(3) As for the company interest, this head of damages was supported by the evidence that the defendant's wrongful entry of the private caveats had resulted in the plaintiff having to take a loan of RM700,000 from Purcon to complete the payment of the purchase price for the property (see para 29).

(4) The presumption of moneylending under s 3 of the Act can only be invoked by the person on whom interest was imposed. Here, the defendant was making an issue over a contractual transaction to which he was not privy. The absence of privity of contract meant that the defendant had no locus standi to raise the issue of moneylending. Even if this was an issue, the one-off loan given by Purcon to the plaintiff at an interest rate of 8% per annum did not per se make it a moneylending transaction. Further, Purcon did not have as its primary object the lending of money and, as such, the Act was not applicable by virtue of s 2A(1)(h) thereof (see paras 34, 36 and 37).

(5) The learned registrar's decision on the award of the legal fees, which were incurred by the plaintiff in getting the caveat removed, should not be disturbed (see para 38); *Lo Foi v Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244 followed.

[**Bahasa Malaysia summary**

Plaintif telah membeli sebidang tanah dalam lelongan awam. Defendan telah memasukkan kaveat persendirian. Urusan jual beli ini tidak dapat diselesaikan pada tarikh yang diberikan. Plaintif telah memohon pelanjutan masa dari mahkamah untuk menghentikan dari lucutan hak deposit yang dibayar plaintif.

Mahkamah seterusnya telah mengetepikan kaveat persendirian dan juga telah mengarahkan defendan membayar ganti rugi kepada plaintif. Pendaftar telah menyenaraikan ganti rugi yang perlu dibayar oleh defendan; (a) kadar faedah bank yang berjumlah lebih kurang RM20,358.52 yang dibayar oleh plaintif kepada banknya (b) faedah syarikat yang berjumlah sebanyak RM47,101.37 yang dibayar oleh plaintif ke Pembinaan Purcon Sdn Bhd ('Purcon'); dan (c) yuran guaman yang berjumlah sebanyak RM27,042.90 yang dibayar oleh plaintif kepada peguamnya.

Defendan juga telah merayu menentang keputusan pendaftar. Isu yang dikemukakan adalah pinjaman dari Purcon kepada plaintif membolehkan plaintif menyempurnakan transaksi jual beli memandangkan ianya merupakan satu pinjaman yang tertera di s 3 Akta Peminjam Wang 1951 dan tidak boleh dikuatkuasakan bawah s 15.

Diputuskan, menolak rayuan defendan:

(1) Di bawah s 329(1) Kanun Tanah Negara beban bukti terletak kepada individu yang menuntut pampasan. Individu tersebut mestilah membuktikan bahawa (a) kaveat persendirian telah dimasukkan (b) kaveat persendirian yang dimasukkan itu adalah salah dan tanpa sebab

yang munasabah (c) kerugian atau ganti rugi telah dialami. Dalam kes ini terma (a) dan (b) dapat dibuktikan apabila hakim telah mengarahkan kaveat tersebut dibatalkan (lihat perenggan 17 dan 18).

(2) Faedah yang patut dibayar kepada bank dapat dibayar kerana penangguhan masa yang diberikan oleh mahkamah. Terdapat bukti bahawa kadar faedah bank telah pun dikurangkan setelah mengambil kira pulangan jumlah wang yang telah dibayar oleh plaintif. Plaintif cuba menggunakan isu ini sebagai kerugian. Walaupun kadar faedah bank telah dibayar oleh Purcon bagi pihak plaintif ini tidak mengubah fakta bahawa plaintif masih perlu membayar wang yang dipinjam dari Purcon (lihat perenggan 27 dan 28).

(3) Bagi kadar faedah syarikat tersebut, kerugian yang dialami telah dibuktikan apabila plaintif terpaksa meminjam wang sebanyak RM700,000 dari Purcon untuk membayar baki jumlah pembelian kerana defendan telah memasukkan kaveat yang salah (lihat perenggan 29).

(4) Di bawah s 3 akta tersebut, anggapan pinjaman wang hanya boleh dibangkitkan oleh individu yang mempunyai faedah dari wang tersebut. Defendan membuat isu atas satu transaksi kontrak walaupun defendan tidak ada privi. Ketiadaan priviti dalam kontrak ini menunjukkan defendan tiada ada locus standi untuk membangkitkan isu pinjaman wang. Jika isu ini dibangkitkan, pinjaman yang diberikan oleh Purcon kepada plaintif dengan kadar faedah 8% setahun tidak menjadikannya satu transaksi pinjaman wang, Purcon juga tidak mempunyai objektif utama untuk meminjam wang dan Akta ini tidak boleh di aplikasikan mengikut s 2A(1)(h) (lihat perenggan 34, 36 dan 37).

(5) Keputusan pendaftar atas award yuran guaman yang dialami oleh plaintif untuk membatalkan kaveat tersebut patut kekal (lihat perenggan 38); *Lo Foi v Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244 diikuti.]

Notes

For cases on restraint on dealing, see 8(2) *Mallal's Digest* (4th Ed 2001 Reissue) paras 3857-3642

For cases on moneylenders, see 10 *Mallal's Digest* (4th Ed 2002 Reissue) para 445

Cases referred to

Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor [1997] 2 MLJ 775 (refd)

Baju Ria v Liau Kim Lian [1965] 1 MLJ 128 (refd)

Cheng Chin Chong v Shak Heng & Sons Sdn Bhd [1981] CLJ 91 (refd)

Coke & Coal Products (M) Sdn Bhd v Hon Swee Kong & Ors [1999] 4 MLJ 453 (refd)

Dan Sin Wah v Chan Hai Swee [1951] 17 MLJ 189 (refd)

Jayasankaran v Public Prosecutor [1983] 1 MLJ 379 (refd)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

Larut Matang Supermarket Sdn Bhd v Liew Fook Yung [1995] 1 MLJ 375 (refd)
Lo Foi v Lee Ah Hong & Ors [1998] 1 CLJ Supp 244 (folld)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336 (refd)
Minty Holdings Sdn Bhd v JB Properties Sdn Bhd; SK Brothers Realty (Third Party) [1998] 7 MLJ 182 (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9 (refd)
Ong Eng Chai v China Insurance Co Ltd [1974] 1 MLJ 82 (refd)
Owners of Dredger Liesbosch v Owners of Steamship Edison [1933] AC 449 (refd)
Quill Construction Sdn Bhd v Tan Hor Teng & Anor [2003] 7 CLJ 24 (refd)
The Owners of The Ship or Vessel Mt 'Rowan' v The Owners of The Ship or Vessel or Property 'Singapura Timur' [2003] 2 MLJ 441 (refd)
Yeep Mooi v Chu Chin Chua & Ors [1981] 1 MLJ 14 (refd)

Legislation referred to

Moneylenders Act 1951 ss 2A(1)(h)3, 15
National Land Code ss 329(1), 322(2)

Dheema Ariyapala (Adrin Adzuan Mohd Daud with her) (Dheema Adrin & Co) for the plaintiff/applicant
IN Jeganathan (KF Yoong with him) (KF Yoong & Co) for the defendant/respondent

Low Hop Bing J:

I. APPEAL

[1] This is an appeal in enclosure (35) filed by the defendant against the decision of the learned registrar who on 19 September 2003 awarded the following heads of damages in favour of the plaintiff:

1. Interest amounting to RM20,358.52 paid by the plaintiff to his bank ('bank interest');
2. Interest amounting to RM47,101.37 paid by the plaintiff to Pembinaan Purcon Sdn Bhd ('company interest'); and
3. Legal fees amounting to RM27,042.90 paid by the plaintiff to his solicitors ('legal fees').

II. FACTUAL BACKGROUND

[2] On 10 December 1998, the private caveats lodged by the defendant were set aside by the learned Judge who also ordered that damages be assessed and paid by the plaintiff to the defendant, inter alia, in the following terms:

(iii) bahawa Responden kena membayar gantirugi kepada Pemohon akibat salah kaveatnya ke atas hartanah tersebut yang akan ditaksirkan kelak;

(iv) bahawa segala kos bagi permohonan dan kos sampingan baginya boleh dibayar dan ditanggung oleh pihak Responden.'

[My translation:

(iii) that the Respondent do pay damages to the applicant consequent upon the wrongful caveat on the said property, to be assessed;

(iv) that all costs of the application and ancilliary costs are payable and to be borne by the Respondent]

[3] The applicant is the plaintiff while the respondent is the defendant.

III. Submission for Defendant

[4] En I N Jeganathan and En K F Yoong, both learned counsel for the defendant, submitted that the plaintiff is only entitled to claim loss of his own money or loss of use of his own money resulting from the wrongful caveats. Reliance was placed on ss 329(1) and 322(2) of the National Land Code 1965; *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 HC; and *Coke & Coal Products (M) Sdn Bhd v Hon Swee Kong & Ors* [1999] 4 MLJ 453, HC.

[5] A reference hereinafter to a section shall, unless a contrary intention appears, be a reference to that section in the National Land Code 1965.

[6] They added that damages resulting from the plaintiffs impecuniosity are not recoverable, citing *Owners of Dredger Liesbosch v Owners of Steamship Edison* [1933] AC 449, HL, and that the onus is on the plaintiff to show the damage or loss.

[7] In respect of the bank interest, it was contended for the defendant that the plaintiff has admitted that this interest was paid by Pembinaan Purcon Sdn Bhd ('Purcon') vide Purcon's cheque and not by the plaintiff and there was no evidence to show that the plaintiff has repaid the money to Purcon.

[8] It was then stressed for the defendant that the plaintiff has not shown in the evidence relating to the company, interest amounting to RM47,101.37 for the loan of RM700,000 from Purcon to pay the balance of the purchase price for the property.

[9] Further, they canvassed that the interest for the loan is in breach of ss 3 and 15 of the Moneylenders Act 1951 (Act 400) and so is unenforceable by Purcon against the plaintiff and irrecoverable by the plaintiff against the defendant.

[10] On the legal fees, it was submitted for the defendant that they were paid by Purcon, and that the order for assessment of damages did not provide for costs on a solicitor and client basis, seeking support in *Minty Holdings Sdn Bhd v JB Properties Sdn Bhd (SK Brothers Realty, Third Party)* [1998] 7 MLJ 182, HC.

IV. Contention for Plaintiff

[11] For the plaintiff, Cik Dheema Ariyapala and En Adrin Adzuan Mohd Daud contended that the plaintiff has incurred the bank interest for

extension of time as a foreseeable loss. They added that the payment of that interest by a third party, Purcon, does not mean that the plaintiff could not make a claim as the plaintiff has to bear the debt due to Purcon.

[12] In respect of the company interest, it was submitted that the plaintiff had to obtain the loan of RM700,000 from Purcon towards the settlement of the purchase price, and that it was not a moneylending transaction, relying on *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2MLJ 9.

[13] It was argued for the plaintiff that the defendant's refusal to withdraw the caveats had resulted in the plaintiff having to instruct solicitors to remove the caveats and hence the claim for legal fees is justified.

V. Decision of the Court

1. *Authorities Cited for Defendant*

[14] At this juncture, I shall consider some of the authorities cited for the defendant. Section 322(2) provides for the nature and effect of a private caveat and does not have anything to do with the subject matter of the instant appeal pertaining to assessment of damages against the defendant who has wrongfully or without reasonable cause secured the entry of the private caveats.

[15] In *Owners of Dredger Liesbosch* (supra), the assessment of damages was in respect of the issues completely unconnected with the provisions of s 329(1) and so is obviously unhelpful to the defendant herein.

2. *Section 329(1)*

[16] Section 329(1), which has been cited for both the defendant and the plaintiff, regulates the compensation for wrongful caveats in the following words:

> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

[17] In my view, under s 329(1), the burden of proof is cast on the person claiming compensation to establish the following facts:

(a) a private caveat has been entered;

(b) wrongfully or without reasonable cause; and

(c) damage or loss has been suffered thereby.

[18] Items (a) and (b) are non-issues in the appeal before me as they have already been established when the caveats in question were ordered to be removed by the learned Judge. Only item (c) remains to be decided by me in this appeal.

[19] Section 329(1) came up for consideration in *Mawar Biru* (supra) before James Foong JC (now J). The caveat entered by the plaintiff there

was ordered to be removed, with damages to be assessed. At the hearing of the assessment of damages, the defendant claimed loss of interest on the balance of the purchase price, which was dismissed by the learned Judge who held, inter alia, that:

(a) the burden is on the defendant to prove real and actual loss; and

(b) the usual approach to damages in these types of cases is by determining whether there is a property value loss in that there is a decrease in the price of the property after the same is offered for sale subsequent to the caveat being removed and there was no such evidence.

[20] In *Coke & Coal* (supra), the fourth defendant was a director of a company which was the registered proprietor of the lands in question. The receivers and managers of the company as vendors entered into a sale and purchase agreement with the plaintiff as purchaser of the lands. The fourth defendant, among others, caused a caveat to be lodged against the lands. The court removed the caveat and the learned registrar assessed damages at RM205,600. In setting aside the learned registrar's decision, Chin Fook Yen J (as he then was) held that the award for damages was not for property value loss as there was no sale involved, but was for interest that would have accrued on the loan from a bank to use as working capital to carry on the plaintiff's business. The learned Judge who was called upon to determine whether there was evidence of damage suffered by the plaintiff thereby held that the plaintiff had not shown either that he had incurred a loss of his own money or that he had lost the use of his own money.

[21] The plaintiff's claim against the defendant in *Minty Holdings* (supra) for general damages to be assessed as a result of wrongful entry of two caveats lodged by the defendant on the plaintiff's property pursuant to an application under O 14 of the Rules of the High Court 1980 was dismissed by the learned registrar. On appeal to the Judge in chambers, judgment was entered and damages were ordered to be assessed. The learned registrar in the subsequent assessment of damages awarded interest at 8% pa on the 90% of the balance purchase price and the legal fees of RM41,801.80. On appeal by the defendant, the issue was whether the plaintiff suffered such loss or damage as a result of the wrongful lodgment of the caveat by the defendant. Kamalanathan Ratnam J held that the plaintiff had totally failed to prove any actual loss or real damage; and that the legal fees being quantifiable were special damages but the order related to general damages and so the plaintiff had no right to make a claim for ascertained legal fees.

[22] In *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244, HC, which was cited for the plaintiff, upon the removal of the caveat lodged by the plaintiff therein, the defendants claimed that the caveat had thwarted their proposed development on the property and applied for compensation under s 329(1), claiming RM2.75 million for loss of profits and RM2.7 million for loss of rentals, all of which were disallowed by the learned registrar except for the RM2,000 fee which the defendants had incurred to get the caveat removed. On appeal, Abdul Malik Ishak J held that damages under s 329(1) must be assessed in accordance with the principles of the law of tort and that

would be the reasonable foreseeability test. Hence, the damages would be recoverable if they come within the range of damages recoverable in law, and if they are not too remote. Since the defendants had failed to prove their claims, the defendants' appeal was dismissed.

[23] In *Quill Construction Sdn Bhd v Tan Hor Teng & Anor* [2003] 7 CLJ 24, HC, the defendant had appealed against the decision of the learned registrar who had allowed the plaintiff's claim for RM222,548.46, being losses incurred by the plaintiff as a result of the private caveat wrongfully lodged by the defendant on the plaintiff's property. Abdul Malik Ishak J, in dismissing the appeal, held that the loss incurred would cover expenses which the plaintiff had incurred in seeking to remove the private caveat under s 327, and also the additional losses incurred by the plaintiff arising from the delay in the completion of the sale and purchase agreement, as itemised at RM222,548.46.

[24] So far as I am aware, our Federal Court and Court of Appeal have had no opportunity to consider the purview and ambit of s 329(1) in relation to assessment of damages.

[25] In my judgment, for the purpose of assessing 'compensation to any person or body who thereby suffers any damage or loss' under s 329(1), on the basis of the aforesaid High Court judgments, the following principles may be culled:

(a) The assessment of compensation under s 329(1) must be undertaken on the facts and circumstances established by way of the evidence adduced before the assessor having regard to the terms of the order for such assessment;

(b) The burden is on the claimant to prove real and actual loss: *Cheng Chin Chong v Shak Heng & Sons Sdn Bhd* [1981] CLJ 91; *Mawar Biru* (supra), *Coke & Coal* (supra), *Minty Holdings* (supra); *Lo Foi* (supra); and *Quill Construction* (supra).

(c) The usual approach is by determining in the first instance, whether there is a property value loss in that there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being removed: *Mawar Biru* (supra); *Coke & Coal* (supra). However, in my view, this is not the only approach.

(d) The claimant must prove loss of his own money or loss of use of his own money: *Coke & Coal* (supra).

(e) Damages must be assessed in accordance with the principles of the law of tort by reference to the reasonable foreseeability test, ie, reasonable in law and not too remote : *Lo Foi* (supra).

(f) Compensation would include any fee and expenses incurred to get the caveat removed: *Lo Foi* (supra); *Quill Construction* (supra).

(g) The claimant has the duty to mitigate his loss: *Coke & Coal* (supra); *Lo Foi* (supra); and *Quill Construction* (supra).

3. *Is the Learned Registrar's Assessment Correct?*

[26] The sole question before me is:

> In the light of the terms of the Judge's order as alluded to above, is the learned registrar correct in awarding the aforesaid heads of damages?

(1) Bank Interest

[27] In respect of the bank interest, it is to be noted that there is evidence showing that the plaintiff had purchased the property in a public auction on 9 December 1998, and on 10 December 1998 the defendant had lodged the private caveats. Consequently, the sale of the property could not be completed and hence it could not be registered in the name of the plaintiff until 13 March 2000. The completion date should have been 8 March 1999. The plaintiff had to obtain, and did obtain, from the court an extension of time to overcome this difficulty and also to avoid the forfeiture of RM98,000 which the plaintiff had paid as deposit for the purchase. With the extension of time granted by the court, the plaintiff had to pay the bank interest. The question of the plaintiff's impecuniosity is completely non-existent as the whole situation was brought about by the defendant's private caveats. In fact, there was evidence that the bank interest has been reduced after taking into account a refund of RM1,691.48 as the plaintiff was able to settle the balance purchase price by 1 June 1999 instead of 8 June 1999. This obviously constituted a mitigation of loss by the plaintiff.

[28] While it is true that the bank interest has been paid by Purcon on behalf of the plaintiff, it does not alter the fact that the plaintiff eventually has to repay the sum of RM22,050 to Purcon.

(2) Company Interest

[29] The next head of damages by way of company interest is supported by the evidence that the defendant's wrongful entry of the private caveats had resulted in the plaintiff having to take a loan of RM700,000 from Purcon in order to complete the payment of the purchase price for the property. The interest is based on the rate of 8% pa.

[30] On the defendant's contention that the loan is a moneylending transaction under s 3 of the Moneylenders Act 1951 and hence unenforceable under s 15 thereof, it is necessary for me to look at s 2 of this Act which defines a moneylender as including every person whose business is that of moneylending or who carries on or advertises himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent. Whether or not Purcon carries on the business of a moneylender is a question of fact.

[31] In *Baju Ria v Liau Kim Lian* [1965] MLJ 128, at p 130, Thompson CJ (as he then was) said that 'carrying on' involves some sort of continuing conduct, ie, more than occasional or disconnected loans, and that each case

must depend on its own peculiar features and a question of degree. The charging of interest on money lent does not on its own make one a moneylender, although it raises the presumption under s 3 of the Act: *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14, FC; *Larut Matang Supermarket Sdn Bhd v Liew Fook Yung* [1995] 1 MLJ 375.

[32] Section 3 of the Act provides as follows:

> Save as excepted in section 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender.

[33] Who then should invoke the presumption under s 3 of this Act? The answer is plain and obvious, ie, the person on whom the interest was imposed.

[34] The defendant who is a stranger to the loan is making an issue over a contractual transaction to which he is not privy. In my judgment, the complete absence of privity of contract means that the defendant is in no position to be clothed with any locus standi so as to entitle him to raise this issue.

[35] The instant appeal does not revolve around a claim by the loaner Purcon against the loanee, the plaintiff, for the repayment of the loan and the interest. The issue of a moneylending transaction is a non-issue.

[36] Even assuming for a moment that it is an issue, in my view, the one-off loan given by Purcon to the plaintiff at an interest rate of 8% pa does not per se make the transaction a moneylending transaction. The plaintiff who is the loanee is not raising this issue at all. It is my specific finding that it is not a moneylending transaction.

[37] Be that as it may, it is significant to note that Purcon is not a company having for its primary object the lending of money and so the Moneylending Act 1951 does not apply, as is evident from the following words in s 2A(l)(h) which reads:

> (1) This Act shall not apply to
>
> .....
>
> (h) any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

(3) Legal Fees

[38] The final item raised by the defendant pertaining to legal fees has already been resolved in *Lo Foi* (supra) where the RM2,000 fee incurred to get the caveat removed was allowed by the learned registrar and it was not disturbed by the learned Judge.

[39] Further in *Quill Construction* (supra), Abdul Malik Ishak J held, inter alia, that the compensation would also cover expenses incurred in seeking the removal of the private caveat.

4. *Payment made by Purcon*

[40] Notwithstanding the fact that the damage or loss has been paid by Purcon on behalf of the plaintiff, it is in my view the payment of the plaintiff through Purcon. The maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself) applies here.

[41] Illustrations of the application of this maxim abound in the cases which came up for consideration and determination by our courts.

[42] In *Dan Sin Wah v Chan Hai Swee* [1951] MLJ 189 at p 193, Briggs J held that the execution of a document by a donee of a power of attorney granted pursuant to the Powers of Attorney Ordinance 1949 was an execution by the donor.

[43] An insurance agent who was authorised to fill in and sign a proposal form was held to have done so on behalf of the policy holder, as the legal relationship of principal and agent was created in respect of the proposal form to effect the insurance in question: per Hashim Yeop A Sani J (later CJ (Malaya) in *Ong Eng Choi v China Insurance Co Ltd* [1974] 1 MLJ 82.

[44] The maxim is an expression of the principle governing vicarious liability: per Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC). There a car owner was held liable because he had authorised or requested the act or because the driver was carrying out a task or duty delegated to him, or because he was in control of the driver's conduct. This Federal Court decision was followed by the Court of Appeal in *Adnan bin Hj Mat Jidin & Anor v Irwan Wee bin Abdullah & Anor* [1997] 2 MLJ 775 at p 781.

[45] The Federal Court in *Jayasankaran v Public Prosecutor* [1983] 1 MLJ 379 held that a petition of appeal filed and signed by the solicitor in respect of an appeal against conviction under s 307(iv) of the Criminal Procedure Code was held to have complied with the relevant portion of s 307(iv) which reads: 'the appellant shall lodge … a petition of appeal …'. Although s 307(iv) provides only for the appellant to file the petition of appeal and made no reference at all to the filing by the solicitor, the Federal Court held that the law does not provide for the appellant to do so 'personally' or 'in person'. Therefore, the solicitor filing and signing the petition of appeal would suffice as it attracts the maxim *qui facit per alium facit per se*. See also my judgment in *The Owners of The Ship or Vessel Mt 'Rowan' v The Owners of The Ship or Vessel or Property 'Singapura Timur'* [2003] 2 MLJ 441.

5. *Conclusion*

[46] The plaintiff has discharged the burden of proving real and actual loss in the aforesaid heads of damages, being loss of his own money which is reasonably foreseeable and a direct consequences of the private caveats lodged by the defendant. The plaintiff has also mitigated his loss by reducing the bank interest.

[47] Hence, I hold that the learned registrar is correct in his assessment of damages under s 329(1) which I hereby affirm. That being the case, I dismiss this appeal with costs.

Defendant's appeal dismissed.

Reported by Lim Lee Na